

Towards a Radical Revision of the Northern Ireland Protocol?

Tobias Lock

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The UK Government's [Command Paper](#) released on 21 July 2021 urges a renegotiation of the Protocol on Ireland/Northern Ireland, which forms part of the EU-UK [Withdrawal Agreement](#) (WA). The EU has already indicated that a renegotiation is out of the question. In fact, this blog post argues that it would be constitutionally impossible for the EU to agree to the UK's proposals without agreeing to a radical revision of the Protocol that would endanger the achievement of its overall aims. In addition, the invocation of Article 16 (the safeguards clause) as discussed in the Command Paper would not resolve the underlying issues either and the UK Government knows this. But that leaves the question: What is the Command Paper really about?

What does the Command Paper say?

The aim of the Protocol is to keep the land border between Ireland and Northern Ireland open for people and goods avoiding any physical border infrastructure. The Protocol achieves this by requiring the application of the EU customs code and of EU product standards in Northern Ireland. While Northern Ireland formally remains part of the UK customs territory and of the UK regulatory space, this means in practice that for most goods entering Northern Ireland from Great Britain there is a customs and regulatory border in the Irish Sea. This has led to well-documented grievances, notably on part of the unionist community in Northern Ireland, with a recent [poll](#) suggesting that the population of Northern Ireland is evenly split on the question whether the Protocol is appropriate for managing Brexit.

The Command Paper commences by recounting the history of the Protocol negotiations followed by an expression of the UK Government's discontent with it, which constitutes the basis of the Government's case for its fundamental revision. The Government then discusses the possible invocation of Article 16 of the Protocol (on this later) before making a number of concrete suggestions for revision. These include changes to the customs regime, the rules on sanitary and phytosanitary measures, VAT, and state aid. Many of these proposals constitute a re-hash of earlier UK proposals, which had been knocked back by the EU on various occasions. There is already a good bit of commentary on the trade aspects of the Command Paper (e.g. the twitter threads by [Anna Jerzewska](#) and [Sam Lowe](#)).

This blog post focuses on the much more radical proposals concerning the governance of the Protocol.

Governance issues

The Command Paper identifies Articles 12 (4) to (7) of the Protocol as its ‘most unusual feature’ as it provides for Union law-based enforcement of the goods trade-related provisions contained in the Protocol. In particular, it gives the EU Commission powers of enforcement according to Article 258 TFEU and it gives the UK courts the rights – and in some cases even puts them under a duty – to refer questions of interpretation of EU law made applicable by the Protocol to the Court of Justice according to Article 267 TFEU.

The Command Paper proposes to replace this EU law-based enforcement with the type of enforcement found in the [Trade and Cooperation Agreement](#) (i.e. the future relationship agreement, TCA) between the EU and the UK. According to the Command Paper, this would mean that ‘governance and disputes are managed collectively and ultimately through international arbitration’.

This passage raises more questions than it answers. The main reason for the ECJ's jurisdiction over the trade-related aspects of the Protocol is that the Protocol stipulates that EU law is the law generally applicable to govern movements of goods into Northern Ireland. The same is true for state-aid, VAT and the single electricity market on the island of Ireland. The Court of Justice has exclusive jurisdiction to interpret EU law so far as it has effects within the EU legal order. Otherwise the autonomy of the EU legal order would be undermined. This has long been established in the ECJ's external relations case law, starting with [Opinion 1/91](#) and since confirmed e.g. in the [Mox Plant case](#), [Opinion 2/13](#) and [Achmea](#). This means that so long as the Protocol refers to EU law – and it does so extensively – the Court of Justice must have the final word on its interpretation.

This leaves two possible readings of the UK Government's proposal in relation to Governance.

The first, more benign reading would see dispute settlement aligned to that in the WA (and not the TCA), i.e. it would be confined to inter-party dispute settlement between the EU and the UK, which would primarily be diplomatic and take place in the Joint Committee. Only if the Joint Committee cannot reach a resolution, could one of the parties start arbitration proceedings. In order to preserve the autonomy of EU law, however, the arbitral tribunal would be under an obligation to refer matters of interpretation to the ECJ. This is essentially the kind of dispute settlement provided for in the WA – see Article 174 WA. It is not that contained in the TCA, which does not envisage references to the ECJ, simply because it does not make EU law applicable. While this reading would be compatible with the constraints of EU law, it would seriously weaken the enforceability of the Protocol. Depending on the fate of direct effect (see below) private enforcement could become impossible and public enforcement would become predominantly political rather than legal.

The second, less benign, but literal, reading would necessitate a much more radical revision of the Protocol. Given the constitutional constraints that the exclusive jurisdiction of the Court of Justice places on the EU, the only way to avoid it having

any jurisdiction would be to remove all references to EU law from the Protocol and replace them with *sui generis* rules, which an arbitral tribunal could then interpret freely. Again, one would end up with weak enforcement, but what is more problematic is that this solution would put at risk the entire foundation of the Protocol. The Protocol manages to keep the border free from any physical infrastructure precisely because EU law is applied to goods entering Northern Ireland so that they can then move freely to the single market. If the rules governing entry to Northern Ireland were to be replaced by *sui generis* rules – even if those replicated EU law as it stands today – at least over time there will be divergence through changes in customs tariffs, product standards, etc, and the Protocol would cease to achieve its main goal.

Both readings raise the further question of the direct effect of the Protocol, which is something the Command Paper does not address. According to Article 4 WA, the provisions in the Protocol – like the entire WA – are capable of having direct effect and thus of being enforced in the domestic courts of the UK and the EU. If the UK Government's aim is to align dispute settlement under the Protocol to that found in the TCA, then this would require the parties to adapt the direct effect clause in the WA. Otherwise, private enforcement would remain possible. Depending on how this is done, this could have far-reaching consequences beyond questions of trade. A radical abolition of Article 4 WA would for instance endanger the enforceability of the citizens' rights part of the WA. A more limited adaptation that would only affect the Protocol might turn out to be too widely phrased as well and affect its Article 2, which enshrines the individual rights guaranteed in the Good Friday/Belfast Agreement. The Command Paper does not address these important consequences.

This discussion shows that the proposals for governance reform are non-starters from an EU perspective. It is therefore hardly surprising that the proposals to renegotiate the protocol were given [short shrift](#) by the EU Commission only a few hours after the Command Paper had been published.

What next?

How might the UK react to the Commission's refusal? The Command Paper discusses the application of the safeguards clause in Article 16 of the Protocol, but considers its exercise 'undesirable for the time being'. The clause allows one of the parties to adopt safeguard measures if 'the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade.' The UK Government argues that the Protocol has indeed led to diversion of trade and that it has also led to serious societal difficulties, evident in the [violence](#) that took place in Northern Ireland in April.

There are lots of question marks over the interpretation of Article 16, not least whether any diversion of trade – something inherent in Brexit – suffices. Even if it does, Article 16 is not a panacea as it only allows for measures that are 'restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation'. Hence if there is trade diversion with regard to those [emblematic chilled sausages](#) and other meat products, then the UK may well adopt

safeguard measures – i.e. the decision not to enforce EU law banning the import of chilled meats – but nothing more. Importantly, Article 16 cannot be used to suspend all trade aspects of the Protocol.

The EU would then be entitled to adopt rebalancing measures, which would themselves need to be strictly necessary. Whether those rebalancing measures are confined to trade facilitated by the Protocol or could extend to trade under the TCA is not clear.

Hence the invocation of Article 16 would predominantly be symbolic, but would not resolve the underlying difficulties in the long term. It might appease pro-Brexit voices in Northern Ireland and the UK more generally, but it would not help to build the necessary trust between the EU and the UK as the EU would almost certainly launch legal proceedings against the UK.

Three possible explanations

The big question therefore is what this Command Paper is really about. One explanation is that it is designed for domestic consumption only, so that it can largely be ignored. A more sinister explanation would be that it is part of a longer-term strategy to ratchet up resistance to the Protocol amongst the population of Northern Ireland in the hope that the 2022 elections to the Northern Ireland Assembly might return an anti-Protocol majority. With the consent vote according to Article 18 looming in 2024, the Northern Ireland Assembly could thus put an end to the trade elements of the Protocol forcing the EU to re-negotiate those elements of it. While the Article 18 route is the only way towards renegotiation accepted by the EU, [recent polling](#) in Northern Ireland does not suggest that an anti-Protocol majority is likely. A third explanation of the Command Paper would be more benign. It could be understood as containing various options from which to choose, in the hope that some of them might be acceptable to the EU. For instance, the rather hidden suggestion that the EU and the UK should agree a 'standstill' on existing arrangements – including grace periods, etc – could be seen as an attempt to take the heat out of the Protocol negotiations. If this was the intention, one may wonder why the UK Government continues to employ trust-eroding means of delivering these kinds of messages to the EU.

